IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-199

STATE OF MICHIGAN,
Respondent,

v.

HUGH J. GUNNE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now comes, Hugh J. Gunne, by his attorneys, Bushnell, Gage & Reizen, and prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Michigan, entered in the above entitled case on May 9, 1977.

CITATION TO OPINION BELOW

The decision of the Supreme Court of the State of Michigan denying the Defendant's request for Leave to Appeal was filed On May 9, 1977, and is reported at 400 Mich 802 (1977). The opinion of the Court of Appeals for the State of Michigan (on rehearing) affirming Petitioner's conviction, was filed on January 6, 1976, and is reported at 66 Mich App 318; 239 NW 2d 603 (1976). The initial opinion of the Michigan Court of Appeals reversing Petitioner's conviction was filed on October 27, 1975, and is reported at 65 Mich App 216; 237 NW 2d 256 (1975). Copies of all three (3) opinions of the lower Courts are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

The decision of the Supreme Court of the State of Michigan denying Leave to Appeal was filed on May 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

I.

Whether the admission of a prior inconsistent statement of a defense witness after she had asserted the Fifth Amendment privilege as to foundational questions during cross-examination after the prosecutor threatened her with a perjury charge, violated Petitioner's right to confront the witnesses against him, as secured by the Sixth Amendment to the United States Constitituion?

II.

Whether Petitioner was denied due process of law and his right to a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution, by the failure of the prosecutor to disclose the existence of certain evidence prior to trial, which indicated that the complaining witness had committed perjury during the course of Petitioner's preliminary examination and whether the prosecutor's failure to disclose such evidence further denied Petitioner his right to due process of law and a fair trial where the prosecutor failed to correct the perjured testimony already on the record?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which the above entitled Petition involves are as follows:

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defense.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On December 20, 1972, Barbara Kimmel was beaten, shot and left for dead in the trunk of an automobile (R.132-147). Subsequently, Petitioner Hugh J. Gunne and two other persons were charged with the crimes of conspiracy to commit first degree murder and assault with intent to kill and murder Mrs. Kimmel.

The trial of Petitioner and Stanley Kulczyski began on December 4, 1973, in the Recorders Court for the City of Detroit, Michigan.

At trial, Kimmel identified Petitioner Hugh J. Gunne. Stanley Kulczyski and Hank Dombrowski as the individuals who were responsible for the beating and shooting (R.127, 131, 136)

Kimmel claimed that she first came into contact with Petitioner in an effort to obtain money from him for the defense of her husband, Michael Kimmel, who had been charged with the murder of Edward Machuta in another county (R.620). In the course of preliminary examination prior to trial, Kimmel denied that blackmail or extortion were involved in her efforts to obtain money from Petitioner (Preliminary Exam Transcript 76). Kimmel was asked a similar question at trial, and once again denied that blackmail or extortion was her basis for seeking funds from Gunne (R.698, 807).

At the conclusion of the Peoples' case, Petitioner placed before the jury his defense of alibi. In support of his contention that he was not at the scene of the crime at the time charged by the People, Petitioner called Barbara Bowman to testify (R.1482). In the course of the cross examination of Bowman, the prosecutor asked a number of questions concerning certain events, the occurrence of which, if proven, would support the prosecutor's theory of the case (R.1543-1550).

After asking these questions, the prosecutor requested the jury be excused (R.1551-1552). In the absence of the jury, he advised the court that he had evidence in his possession which strongly indicated that Bowman had committed perjury during her cross-examination (R.1564-1565). The prosecutor also indicated that he wished to ask Mrs. Bowman questions concerning the death of Gunne's wife; a death which was hinted by the prosecutor to be a contract murder and for which Gunne had never been charged (R. 1552-1554). Whereupon, out of the jury's presence, witness Bowman invoked the Fifth Amendment in response to a question from the prosecutor concerning her knowledge of the death of Gunne's wife (R.1592).

The next day, the prosecutor presented a petition requesting a grant of immunity for Mrs. Bowman, but made it clear that the grant of immunity did not include immunity for any perjury which she had committed in the course of her cross-examination (R.1779-1780). During this proceeding, in the presence of Bowman, the trial judge indicated that he believed that she had perjured herself (R.1759). Counsel for Bowman informed the Court that in the absence of a total grant of immunity, his client was going to take the Fifth Amendment as to any further

questioning (R.1786-1789, 1619). (Indeed, within hours of her refusal to answer further questions, Bowman was formally charged with perjury (R.1835) and ultimately bound over for trial on that charge (R.2125)).

At this juncture, still out of the presence of the jury, the prosecutor informed the Court that he possessed a tape recording of a telephone conversation between Barbara Bowman and Vicki Machuta (the late Edward Machuta's sister), which was taped on December 7, 1972, and which seemed to indicate that Bowman's denials concerning the events surrounding the shooting of Barbara Kimmel were untrue (R.1614-1616). The taped conversation also indicated that Barbara Kimmel had in fact been extorting and blackmailing Gunne (R.1064-1067; 1672; 1676). The prosecutor further stated that this taped conversation had been in his possession since April, 1973 (R.1718).

Counsel for Petitioner objected to the admission of the tape recording on the ground, *inter alia*, that the playing of the taped conversation would effectively deny Gunne his right to confrontation with respect to the conversation, in view of the previous statement by counsel for the witness Bowman, to the effect that she intended to invoke the Fifth Amendment as to any further questions (R.1593-1620). Counsel also made a Motion to have the entire testimony of Barbara Bowman stricken from the record (R.1600). This Motion was denied after the Court heard various arguments of counsel, and the Court ruled that the tape of the conversation between Bowman and Machuta would be admissable for the limited purpose of impeaching Bowman's credibility (R.1743). The judge later instructed the jury that this evidence could not be used as direct evidence of petitioner's guilt (R.1860-1862).

After this ruling, the jury was brought back into the Courtroom and the prosecutor proceeded to ask three questions of the witness Bowman which dealt with her relationship with the late Edward Machuta (the possible killer of Gunne's wife) and whether or not she told Vicki Machuta something different from what she testified to on direct examination (R.1794-1800). Bowman in the presence of the jury, invoked her Fifth Amendment privilege and refused to answer the questions (R.1794-1799). Since it was obvious that Bowman would continue to invoke the Fifth Amendment, she was excused from the stand (R.1801), and Petitioner rested his case.

The prosecutor called Vicki Machuta as a rebuttal witness, and in the presence of the jury elicited facts with respect to her conversation of December 7, 1972, with Barbara Bowman (R.1855-1878). Thereupon, portions of the recorded conversation of December 7, 1972, were played for the jury (R.1876).

On January 2, 1974, the trial Court instructed the jury as to the applicable Law, and the jury then commenced deliberations at 11:01 A.M. (R.2406). At 11:08, the jury requested that it be allowed to hear the taped conversation between Vicki Machuta and Barbara Bowman (R.2050). The Court Reporter read the transcript that had been prepared with respect to the telephone conversation and at 11:30 A.M. the jury re-commenced its deliberations. At 2:28 P.M. on January 2, 1974, the jury returned verdicts of guilty as charged on both counts against Petitioner (R.2078-2082).

On January 16, 1974, the Trial Court sentenced Petitioner to *mandatory* life imprisonment without possibility of parole on the conviction for conspiracy to

commit first-degree murder and imprisonment of twenty-five to fifty years on the conviction for assault with intent to kill and murder. (R.2108-2109).

In opinions included in Petitioner's Appendix, the Michigan Court of Appeals reversed, and, on rehearing, affirmed the Defendant's conviction, and the Michigan Supreme Court denied Leave to Appeal from the Court of Appeals.

MANNER IN WHICH FEDERAL QUESTIONS WERE SOUGHT TO BE REVIEWED IN THE STATE COURTS

After it became apparent at trial that witness Bowman would invoke the Fifth Amendment, Petitioner raised the issue of his inability now to confront Bowman as required by the Sixth Amendment, and offered to have all of Bowman's testimony stricken from the record (R.1600). The trial Court, in effect, overruled this objection by holding that Bowman could be impeached through use of prior inconsistent statements evidenced by a tape recording of a conversation between Bowman and Vicki Machuta (R.1743).

After Bowman took the Fifth Amendment in the presence of the jury, Petitioner requested a mis-trial, and the Court took the motion under advisement (R.1794-1795).

Bowman was again asked a question, to which she took the Fifth Amendment, and once again Petitioner made a motion for a mis-trial, which the Court also took under advisement (R.1799).

After Bowman invoked the Fifth Amendment for a third time, Petitioner reiterated his motion for a mis-trial and again the Court took the matter under advisement (R.1800).

Just prior to the commencement of the prosecutor's rebuttal evidence, Petitioner once again stated to the Court that he believed he had been denied his constitutional right of confrontation and asked that the entire testimony of Barbara Bowman be struck from the record (R.1834). The Court ruled that Petitioner was not in a position to object to her refusal to testify because he had called Bowman to the stand (R.1835).

After the close of rebuttal, Petitioner brought to the Court's attention the fact that his motions for a mis-trial had been taken under advisement (R.1949). The trial Court then formally denied the motions (R.1950-1951)

After the jury returned a verdict of guilty as charged on both counts against Petitioner, Petitioner brought a motion for a new trial, which was heard before the trial Court on January 16, 1974. At that time, Petitioner raised the Sixth Amendment confrontation issue with reference to the admission of the tape recording between Bowman and Machuta, as a ground for a new trial (R.2122-2127), and also cited the failure of the prosecutor to correct the false evidence which Barbara Kimmel had given as required by the due process clause of the Fourteenth Amendment, to wit: that she was lying when she testified that she was not blackmailing Petitioner (R.2128-2134). The Court denied Petitioner's motion for a new trial (R.2134).

Thereafter, Petitioner timely filed a claim of appeal as a matter of right with the Michigan Court of Appeals,

submitted a written Brief raising several issues, two of which are the subject of this Petition for Writ of Certiorari, oral argument was presented on June 18, 1975, and on October 27, 1975, the Court reversed the Petitioner's conviction for the reason that, under the law of the State of Michigan, the prosecutor had failed to lay a proper foundation prior to using the taped conversation between Bowman and Machuta to impeach Bowman's credibility. The Court further found that all of the other issues raised by Petitioner were "of insufficient substance to merit decisional discussion". *People* v *Gunne*, 65 Mich App 216, 219 (1975).

The prosecutor then petitioned the Court for a rehearing, which was granted, and on January 6, 1976, the Court reversed its decision of October 27, 1975, and affirmed Petitioner's conviction. *People* v *Gunne* (on rehearing), 66 Mich App 318 (1976).

Petitioner applied to the Court of Appeals for a rehearing of the rehearing, such request being denied on February 17, 1976.

On March 8, 1976, Petitioner filed his Application for Leave to Appeal, a Concise Statement of Proceedings and Facts, and a Brief in Support of Application for Leave to Appeal with the Supreme Court of the State of Michigan. The Application for Leave to Appeal raised all of the issues raised in the Court of Appeals, which included the two issues raised in this Petition for a Writ of Certiorari. On May 9, 1977, the Supreme Court denied Application for Leave to Appeal. *People* v *Gunne*, 400 Mich 802 (1977).

REASONS FOR GRANTING THE WRIT

I.

The first question presented by Petitioner is an important Federal Constitutional question which was decided by the State Court in a way not in accord with applicable decisions of this Court interpreting the requirements of the Sixth Amendment right of confrontation.

This Court has stated without equivocation that the "rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process". *Chambers* v *Mississippi*, 410 US 284, 294 (1973). This Court has also held that the "availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State". *Chambers*, 410 US at 297-298.

The trial Court's ruling that Petitioner had no standing to complain because Bowman was his own witness is thus totally contrary to the *Chambers* decision. In any event, although witness Bowman was called by Petitioner in support of his alibi defense, the nature of the prosecutor's cross-examination clearly indicates that he was attempting to use her as a witness *against* the Petitioner. It was the Prosecutor's clear intention to use his questioning of Bowman to establish: 1) a motive, *i.e.* that the victim was blackmailing the Petitioner, and therefore he decided to have her killed, and 2) that Bowman had lied in the course of her direct examination. The obvious import of these questions was to destroy her as an alibi witness. This line of inquiry by the prosecutor

was proper only insofar as the Petitioner had a fair opportunity to cross-examine Bowman with reference to the matters raised by the prosecutor. Bowman's assertion of the Fifth Amendment, however, made it impossible for Petitioner to ask any further questions of Bowman. The Constitutional infirmity which thus arose has been recognized by this Court in *Douglas* v *Alabama*, 380 US 415 (1965), where it was stated with reference to a witness named Loyd, that:

> [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding, petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, (citations deleted); on this record it appears that Loyd was acting entirely in his own interest in doing so. 380 US at 420.

In the instant cause, effective confrontation of Bowman was possible only if Bowman could be questioned about the circumstances under which she made the statements to witness Machuta. This is so, because the clear implication of the tape-recorded conversation between Bowman and Machuta indicated not only that Bowman may have been lying, but that the Petitioner himself was not telling the truth at various times during his testimony. The obvious prejudicial impact of this tape recording could not possibly be cured by limiting instructions, nor can it be denied that the tape had an immense impact on the jury since this was the only portion of the long trial which the jury requested to re-hear after deliberations began.

As this Court stated in *Bruton* v *United States*, 391 US 123, 136 (1968): "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored". *Bruton* involves the prosecutor calling an accomplice who invoked his Fifth Amendment privilege after which the prosecutor sought to "impeach" him by use of a confession. In the case at bar, although Bowman was called by the Petitioner, the content of her taped phone conversation with Machuta left the clear inference that she was, in fact, an accomplice of the Petitioner. Although this case fits within the dictates of *Bruton, supra*, the State Courts of Michigan at all levels chose to ignore it, along with the other cases cited above. The facts of the instant case also reveal that, as in *Douglas* v *Alabama, supra*, the refusal of Bowman to answer the questions of the prosecutor was not procured by the Petitioner. Indeed, the prosecutor made it all but inevitable that the witness would refuse to answer his questions, when he clearly and unmistakably threatened her with a perjury warrant, and then he eliminated any possibility of her testifying when he had her formally charged with perjury. Prior decisions of this Court have made it clear that the agents for the State cannot drive a witness from the stand and then claim that there is no error because the witness was initially called by the Defendant. *Webb* v *Texas*, 409 US 95 (1972). The trial judge likewise violated *Webb* when he stated in the presence of the witness that he believed she had perjured herself.

The total disregard of the opinions of this Court by the various Michigan Courts presents this issue squarely to this Honorable Court in this Petition for Writ of Certiorari.

II.

At every level in this case, the Courts of the State of Michigan ignored relevant pronouncements of this Court in determining that it was not error for the prosecutor to fail to disclose to the Defendant, prior to trial, information in his possession which indicated that the complaining witness had lied on a material point at the preliminary examination. In a long line of cases, this Court has held that a conviction cannot be obtained through the use of false evidence, whether solicited by the prosecutor or not, so long as the prosecutor allows it to go uncorrected. *See, e.g., Mooney* v *Holohan*, 294 US 103 (1934); *Pyle* v *Kansas*, 317 US 213 (1943); *Napue* v *Illinois*, 360 US 264 (1959); *Brady* v *Maryland*, 373 US 83 (1963); *Giglio* v *United States*, 405 US 150 (1972); *Moore* v *Illinois*, 408 US 786 (1972); and *United States* v *Agurs*, 427 US 97 (1976).

In the instant case, the tape recording of the conversation between Barbara Bowman and Vicki Machuta had been in the possession of the prosecutor for several months prior to trial. That taped conversation clearly indicated that the complaining witness, Barbara Kimmel, may, in fact, have been blackmailing the Petitioner. Nevertheless, both at the preliminary examination and at trial, Kimmel denied that she had been involved in any blackmail scheme.

The record supports the proposition that the prosecutor knew, or had reason to know that Kimmel was lying because in a statement to the Judge, out of the jury's presence, the prosecutor stated that he intended to show that Barbara Kimmel represented a threat to the Petitioner with respect to disclosure of Petitioner's alleged role in the death of his wife (R.1552-1554). The

ultimate effect of this conduct on the part of the prosecutor was to reduce Petitioner's trial to a "battle of wits" and a matter of "game theory", the very result which the above cited cases of this Court were designed to avoid. As this Court stated in *Napue*, 360 US at 269-270:

> . . . The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness is testifying falsely, that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People* v *Savvides*, 1 NY2d 554, 557, 154 NYS 2d 885, 887, 136 NE2d 853, 854, 855.
>
> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . ."

Not only did the prosecutor have a duty to correct perjured testimony placed in the record, but he also had a duty to disclose the existence of the tape recording to petitioner prior to trial in light of the clear materiality of the evidence to petitioner's defense. The rationale for this duty of disclosure was recently stated by this Court as follows:

> As the District Court recognized in this case, there are situations in which evidence is obviously of such substantial value to the defense that

> elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest "that justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer." Berger v United States, 295 US 78, 88, 79 L Ed 1314, 55 S Ct 629. This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence. *United States* v *Agurs*, 427 US at 110-111.

While it can be argued that the disclosure of such information was not required in this case since it provided a motive for the crime, and thus was inculpatory rather than exculpatory, it is also clear that the Petitioner's defense rested almost entirely upon destroying the credibility of Kimmel. In this regard, it can also be argued that if Kimmel was, in fact, blackmailing the Petitioner, then the failure of the Petitioner to accede to her threats and demands supplied a motive for Kimmel to lie about his involvement in the crimes charged and, thus, could have supplied a reasonable doubt as to petitioner's guilt.

The prosecutor's duty in the instant case can be no less than that enunciated in *Napue* and *Agurs*, especially in light of the fact that under Michigan law, conviction for conspiracy to commit first degree murder carries a mandatory penalty of life imprisonment without possibility of parole. MCLA 750.157 A; 750.316.

Accordingly, the failure of the State Courts of Michigan to follow the dictates of this Court in its interpretation of the Fourteenth Amendment to the United States Constitution, as it relates to the issue raised by Petitioner, properly presents this question to this Honorable Court in this Petition for Writ of Certiorari.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

BUSHNELL, GAGE & REIZEN

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Dated: August 3, 1977

APPENDIX

DECISION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

(People of The State of Michigan, Plaintiff-Appellee, v Dr. Hugh R. Gunne, et al., Defendants-Appellants)
Supreme Court No. 58188
COA: 19135 LC: 72-10174

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 9th day of May in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable Thomas Giles Kavanagh, Chief Justice.

G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

OPINION OF MICHIGAN COURT OF APPEALS

People v Gunne (On Rehearing)

Evidence — Witnesses — Impeachment — Prior Inconsistent Statements — Foundational Questions — Refusal to Answer — Right Against Self-Incrimination.

Prior inconsistent statements of a witness may be introduced into evidence for purposes of impeachment even though the witness has asserted his Fifth Amendment rights and refused to answer foundational

questions; the requirement of asking foundational questions is to avoid surprising the witness to be impeached, which purpose is accomplished once the questions are posed, and if the evidence sought to be introduced is otherwise competent, relevant and material, there is no valid reason for its exclusion.

Appeal from Recorder's Court of Detroit, Thomas L. Poindexter, J. Submitted June 18, 1975, at Detroit. (Docket No. 19135). Decided October 27, 1975. Opinion on rehearing filed January 6, 1976.

Dr. Hugh R. Gunne was convicted of conspiracy to commit first-degree murder and assault with intent to commit murder. Reversed and remanded, 65 Mich App 216. On rehearing, the original opinion is vacated and the trial court is affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *William L. Cahalan*, Prosecuting Attorney, *Patricia J. Boyle*, Principal Attorney, Research Training, and Appeals, and *Michael R. Mueller*, Assistant Prosecuting Attorney, for the people.

Barris & Crehan, P.C. (by *Ivan E. Barris* and *Michael H. Golob*) for defendant.

Before: T.M. Burns, P.J., and Quinn and M.J. Kelly, JJ.

REFERENCE FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §118

29 Am Jur 2d, Evidence §§189, 638, 640.

ON REHEARING

T.M. Burns, P.J. Our original opinion in this case is at 65 Mich App 216 (1975). In that opinion we reversed defendant Gunne's conviction for conspiracy to commit first-degree murder and assault with intent to commit murder. We held that a defense witness was improperly impeached by the admission into evidence of a prior inconsistent statement without a foundation first being laid for such impeachment. The prosecutor had in fact asked the foundational questions, but the witness refused to answer them, exercising her Fifth Amendment right against self-incrimination. Our holding, then, was that where a witness has exercised his/fififi Fifth Amendment privilege against self-incrimination in response to foundational questions put by the prosecutor, it is impossible to lay a foundation properly, and therefore, inconsistent statements cannot be shown.

After our opinion in this case was released, plaintiff sought a rehearing, which we hereby grant. Upon reconsideration of the crucial issue in this cause, we are convinced of the inappropriateness of our previous decision. Our original disposition is vacated and the trial court is affirmed.

Whether prior inconsistent statements may be introduced into evidence for purposes of impeachment when the witness sought to be impeached asserts her Fifth Amendment rights in response to foundational questions?

Upon reconsideration of this question, we answer in the positive. The purpose of the rule requiring the asking of foundational questions is to avoid surprise of the

witness to be impeached. This purpose is accomplished once the questions are posed.[1] Answers by the witness are not required. He may answer such questions to deny that prior inconsistent statements were made, or he may explain the prior statements in an attempt to nullify or lessen their impeaching nature.

Denial of the admission of impeaching evidence only because the witness does not respond to foundational questions is unwarranted.[2] If the evidence sought to be introduced is otherwise competent, relevant and material, there is no valid reason for its exclusion.

Defendant's argument that the proper solution should have been to strike the witness's testimony on direct examination is forceful, but we are not convinced of the wisdom of adopting such a rule. Once the witness's testimony has been received, the damage, so to speak, has been done. Striking untruthful testimony from the record is easy. Removing the same from one's memory and consideration is not. The purpose of a trial is to bring out all the relevant facts in a case. If proper evidence concerning the incident in question exists, it should be brought out. Showing that a witness may well have lied in his testimony advances the truth far more than removing the former testimony from the case.

The admission of the impeachment evidence was proper. The trial court is affirmed.

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[1] *See* Judge Kelly's dissenting opinion in this case, *People v Gunne*, 65 Mich App 216; 237 NW2d 256 (1975). See also 3A Wigmore Evidence, §1019, pp 1008-1009 (Chadbourn Rev Ed 1970).

[2] *See People v Smith*, 2 Mich 415 (1852), *Anthony v Cass County Home Telephone Co*, 165 Mich 388; 130 NW 659 (1911).

OPINION OF MICHIGAN COURT OF APPEALS

PEOPLE v GUNNE

1. Witnesses — Impeachment — Prior Inconsistent Statements — Laying of Foundation.

A foundation must be laid by asking a witness preliminary questions in order to impeach the witness by showing a prior inconsistent statement.

2. Witnesses — Criminal Law — Impeachment — Prior Inconsistent Statements — Laying of Foundation — Self-Incrimination.

Admission of a tape recording into the record as an attack on a defense witness's credibility through proof of prior inconsistent statements was reversible error where, after the prosecutor admitted that the proposed foundation questions could be incriminating to the witness, the trial court held that the tape recording could be admitted without any foundation testimony for the impeachment of the witness.

3. Witnesses — Criminal Law — Impeachment — Prior Inconsistent Statements — Harmless Error.

Erroneous admission of a tape recording into evidence as a prior inconsistent statement of a defense witness was not harmless error beyond a reasonable doubt where the witness was the only person to corroborate a good deal of the defendant's own testimony, and the witness's testimony had an obviously important bearing on the defense.

4. Witnesses — Criminal Law — Prior Inconsistent Statements — Laying of Foundation — Self-Incrimination.

Prior inconsistent statements of a witness cannot be shown where it is impossible to lay a foundation properly because the witness exercises the Fifth Amendment privilege against self-incrimination in response to foundational questions put by the prosecutor (US Const, Am V).

5. Witnesses — Criminal Law — Impeachment — Prior Inconsistent Statements — Laying of Foundation — Self-Incrimination.

The foundation is laid for the admission of impeachment of a defense witness by prior inconsistent statements when the prosecutor asks the foundational questions; the witness cannot nullify that foundation by refusing to answer on the grounds that the questions might be self-incriminating.

DISSENT BY M.J. KELLY, J.

Appeal from Recorder's Court of Detroit, Thomas L. Poindexter, J. Submitted June 18, 1975, at Detroit. (Docket No. 19135.) Decided October 27, 1975. Leave to appeal applied for.

Dr. Hugh R. Gunne was convicted of conspiracy to commit first-degree murder and assault with intent to commit murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *William L. Cahalan*, Prosecuting Attorney, *Patricia J. Boyle*, Principal Attorney, Research, Training and Appeals, and Michael R. Mueller, Assistant Prosecuting Attorney, for the people.

Ivan E. Barris, for defendant.

REFERENCES FOR POINTS IN HEADNOTES

[1-5] 58 Am Jur, Witnesses §685 *et seq.*
21 Am Jur 2d, Criminal Law §118.

Before: T.M. Burns, P.J., and Quinn and M.J. Kelly, JJ.

T.M. Burns, P.J. On January 2, 1974, defendant Dr. Hugh R. Gunne,[1] was convicted by a jury of conspiracy to commit first-degree murder[2] and assault with intent to commit murder.[3] On January 16, 1974, defendant was sentenced to life imprisonment on the charge of conspiracy to commit murder and 25 to 50 years imprisonment on the charge of assault with intent to kill and murder. On that same date the trial court denied defendant's motion for a new trial. This appeal followed.

The chief witness for the prosecution was Barbara Kimmel, the alleged victim of the charged crimes. After the jury had been excused, defense counsel sought to question Mrs. Kimmel about an outstanding capias warrant against her for failure to appear at a trial relating to a charge lodged against her in Washtenaw County. The trial court sustained the prosecutor's objection on the ground that the question was an inquiry into a charge rather than a conviction and was thus impermissible.

Defendant's attorney also questioned Mrs. Kimmel regarding certain criminal convictions. She admitted two convictions concerning occupying a hotel room with a male other than her husband but denied the existence of a third conviction concerning loitering at a place of illegal business. When defense counsel attempted to introduce extrinsic evidence of the loitering conviction, the trial

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1 Defendant was tried jointly with Stanley Kulczyski. Another alleged co-conspirator was not tried since his whereabouts were unknown.

2 MCLA 750.157a; MSA 28.354(1).

3 MCLA 750.83; MSA 28.278.

court sustained the prosecutor's objection on the ground that the 1968 conviction was had without benefit of counsel. There was also some discussion as to whether a conviction for violating an ordinance as opposed to a statute is a crime.

The defense called Barbara Bowman, a nurse who worked for the defendant, as an alibi witness. On cross-examination, the prosecutor attempted to introduce a tape recorded telephone conversation between the witness and a third party to show similar or prior acts in an effort to establish the motive of the defendant.[4] After the trial court held that the tape could not be admitted for such purpose, the prosecutor offered to introduce the tape as a prior inconsistent statement of the witness Bowman contradicting her testimony on direct examination. It soon became apparent that the witness would exercise her Fifth Amendment privilege in response to any foundational questions necessary for the admission of the tape recording. Defense counsel then moved to strike the testimony of Bowman since cross-examination would not be available. The trial court denied the motion. When the prosecutor conceded that the foundation question might be incriminating, the trial court ruled that the introduction of the tape was permissible without the necessity of laying a foundation.

There are several assignments of error. We have considered them all. Although we specifically speak to only one issue, the others have not been disregarded.

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4 We note that the tape recording in question was made with the consent of the third party who subsequently turned the tapes over to the Dearborn Police Department. No warrant was ever issued for their making.

Rather we consider them to have raised issues of insufficient substance to merit decisional discussion. As to each we have found no deviation from sound and accepted trial procedure or established case law. The singular issue which we consider to be decisional, and indeed to mandate reversal, is whether the trial court erred reversibly when it admitted the tape recording of a prior inconsistent statement made by defense witness Barbara Bowman in order to impeach her direct testimony.

Defendant contends that the tape recording was inadmissible because the prosecutor had not laid the requisite foundation for impeachment of a witness by a prior inconsistent statement. As mentioned earlier, after the prosecutor admitted that the proposed foundation questions could be incriminating, the trial court held that the tape could be admitted without any foundation testimony. This was reversible error.

It has long been held in Michigan that in order to impeach a witness by showing a prior inconsistent statement of that witness a foundation must be laid by asking the witness preliminary questions. *People v George Jones*, 48 Mich App 102; 210 NW2d 145 (1973), *Ebel v Saginaw County Board of Road Commissioners*, 386 Mich 598, 608; 194 NW2d 365, 369 (1972), *Scholnick v Bloomfield Hills*, 350 Mich 187, 195; 86 NW2d 324, 328 (1957), *Rodgers v Blandon*, 294 Mich 699; 294 NW 71 (1940). This foundation requirement has been strictly enforced. See *People v Jones, supra*, concurring opinion of Judge Gillis at 111, *Ebel v Saginaw Road Commissioners, supra, Rodgers v Blandon, supra*. No foundation was laid for the impeachment of Barbara Bowman by proof of prior inconsistent statements, and therefore, the admission of the tape recording into the

record as an attack on Bowman's credibility was erroneous. *People v Jones, supra, Ebel v Saginaw Road Commissioners, supra*, 98 CJS, Witnesses, §480, pp 362-364. Since Barbara Bowman was the only person to corroborate a good deal of defendant's own testimony, her testimony had an obviously important bearing on the defense and, therefore, we cannot say that the admission of the tape into evidence was harmless error beyond a reasonable doubt. *People v Jones, supra, People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972). We hold that where, as here, a witness has exercised her Fifth Amendment privilege against self-incrimination in response to foundational questions put by the prosecutor, it is impossible to lay a foundation properly and therefore prior inconsistent statements cannot be shown. *Cf. Ebel v Saginaw Road Commissioners, supra.*

Reversed and remanded for a new trial.

Quinn, J., concurred.

M.J. Kelly, J. *(dissenting)*. This case presents a question which apparently has not been considered before by the appellate courts of this state. The question is whether prior inconsistent statements may be introduced into evidence for purposes of impeachment when the witness sought to be impeached asserts her Fifth Amendment rights in response to foundational questions. In other words, can a witness prevent the laying of a foundation for the admission of impeaching statements by exercising her privilege against self-incrimination? After surveying the authorities I must conclude that, in such a case, the foundation is laid when the prosecutor asks the foundational questions, and the witness cannot nullify that foundation by refusing to answer on the grounds that she might incriminate herself.

In *State v Haworth*, 24 Utah 398; 68 P 155 (1902), the Supreme Court of Utah considered a problem very similar to the one at bar. There, as here, the witness was called by the defense and gave favorable testimony on direct examination. There the defendant was charged with first-degree murder and offered as an alibi witness one Reavis. On cross-examination, the prosecution sought to lay the foundation for impeachment by questioning Reavis about a conversation he had with a Mr. Grant. Reavis declined to answer on the grounds that his answer might tend to incriminate him. Afterwards Mr. Grant was placed on the witness stand by the state, and questioned about the conversation. Defense counsel objected on the grounds that Reavis had a right not to answer and thus the foundation had not been laid. The objection was overruled. The Supreme Court of Utah affirmed, explaining that the purpose of the rule is to give the witness an opportunity to respond:

> "The reason of [*sic*] the rule which prohibits a witness from being impeached by proof of his contradictory statements until, on cross-examination, he shall have first been interrogated in respect to the circumstances, and as to when, where, and to whom the statements were made, is aptly stated in 1 Greenleaf, Evidence (15th ed) §462, as follows: 'This course of proceeding is considered indispensable, from a sense of justice to the witness; for, as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a redirect examination to explain the

> nature, circumstances, meaning, and design of what he is proved elsewhere to have said.' When the foundation for the impeachment is so laid, the reason of the rule is fully met; and it follows that unless the witness, on his cross-examination, admits the imputed statements, and they do not relate to a collateral and immaterial matter, the adverse party then has the right to prove the contradictory statements, and the witness cannot defeat that right by refusing to answer on the ground that he would thereby criminate himself, or by answering that he has no recollection of having made the statements imputed to him. This position is sustained not only on principle, but by the weight of both the American and English authorities. [Citations omitted.]" 68 P at 163.

According to Wigmore, the rule requiring that a foundation be laid for impeachment by prior inconsistent statement had its genesis in *The Queen's Case*, 129 Eng Rep 976 (1820). See IIIA Wigmore, Evidence (Chadbourne Rev), §1026, p 1021.

The opinion of Chief Justice Abbott in that historic case discusses the very problem with which we are faced in the case at bar. The relevant portion of *The Queen's Case, supra* was quoted with approval in *State v Haworth, supra*, 68 P at 163:

> " ' *** If it be intended to bring the credit of a witness into question by proof of anything that he may have said or declared touching the cause, the witness is first asked upon cross-examination whether or no he has said or declared that which is intended to be proved.*** If the witness declines to give any answer to the question

> proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, *the adverse party has, in this instance, also, his subsequent opportunity of tendering proof of the matter*, which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him an opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to.' " (Emphasis added.)

In the case at bar, the trial court ruled that the introduction of the tape recording which constituted the impeaching conversation was permissible without the necessity of laying a foundation. Nevertheless, the prosecutor went on to ask the foundational questions. Thus the witness was given an opportunity to answer, and that is all that is required. The foundation was laid when the prosecutor asked the question; the failure of the witness to answer did not render the prior inconsistent statement inadmissible.

I would affirm.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-199

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent,

vs.

HUGH J. GUNNE,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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QUESTIONS PRESENTED

I.

WHETHER THE ADMISSION OF A DEFENSE WITNESS' PRIOR INCONSISTENT STATEMENT WHEN, ON CROSS-EXAMINATION, SHE ASSERTED THE FIFTH AMENDMENT PRIVILEGE AS TO FOUNDATIONAL QUESTIONS VIOLATED PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM GUARANTEED BY U.S. CONST., AM. VI?

II.

WHERE A CLAIM OF PROSECUTORIAL WITHHOLDING OF KNOWN PERJURED TESTIMONY WAS NOT RAISED IN EVERY LOWER COURT IN THE MANNER PRESENTED, IS THE DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY U.S. CONST., AM. XIV VIOLATED?

Complaining witness Barbara Ann Kimmel testified that on April 13, 1972 she received a telephone call from her husband (p 66) informing her that he was in the Hillsdale County Jail (p 68) on an open charge of murder (p 69) in the death of one Mack Machuta (p 69). She had no funds with which to hire an attorney (p 70). Mack Machuta told her earlier that if she ever needed help to go to Dr. Gunne (p 72). She first called Dr. Gunne in May of 1972 (p 72) using the alias Linda Swanson (p 75) to borrow money for her husband's legal fees (p 77, 78). Thereafter, she made a series of telephone calls to Dr. Gunne and visited him at his Joy Road clinic (p 84). She identified defendant Dr. Hugh Gunne as the doctor she saw (p 84). She spoke of telephone calls to the doctor's office from complainant and some meetings between them (p 86). Dr. Gunne lent her $858 at Carl's Chop House (p 95) and told her that four days were needed for him to sell stock shares to get more money (p 93). Finally, on December 20, 1972 she went to meet Dr. Gunne at Frankie's Bar (p 114). She called Dr. Gunne from the bar who said he thought the meeting was to occur at his office (p 120). She drove to that location (p 121). As she pulled into the lot, she saw the doctor at his car (p 127) and asked whether he had the papers (p 128). The doctor said they were on his desk and she and the doctor went into the clinic (p 128). In his office, the doctor pulled a gun (p 130) and called her a son of a bitch (p 131). The door was slammed shut by someone else (p 131) and she was beaten on the head with a black jack (p 132) by Hank Dombrowski (p 131). The door opened and a man whom Hank called Stanley came in (p 134, 135), grabbed her and said 'You son of a bitch on the telephone' (p 136). She identified Stanley Kulczyski (p 136). Hank taped her mouth and hands (p 137). Kulczyski displayed a gun one and a half feet long and a shoulder strap (p 138). She was dragged outside (p 138). She tore the tape off her mouth and screamed. Hank hit her with the black jack and tried to put her into the trunk of a car (p 139). The tape was replaced over her mouth (p 139), she was

placed in the trunk and the lid was closed and the car drove away (p 140). She didn't know who had gotten into the car (p 140). After 10 minutes the car stopped, Hank opened the trunk (p 141), put a small black hand gun to her right cheek and fired (p 142). She was struck by the bullet (p 143). Hank put the gun to her temple but she pushed the gun away (p 143). Hank then put the gun to her chest and fired. Again she was struck (p 143). Hank pulled the trigger two more times but the gun misfired (p 143). He shut the trunk (p 143) and the car started moving (p 145). The car stopped again, Hank opened the trunk and cut the tape from her hands and face (p 145). She was playing dead (p 147) and she was taken for dead (p 146). The trunk lid was closed (p 147). She heard a car, called out, the police arrived and freed her (p 148).

Charles Knotts testified that on December 20, 1972 he met Barbara Ann Kimmel at the Red Dog Bar and accompanied her to Frankie's Bar where he entered first and she seconds later. They sat apart from each other (p 252ff). Later, he accompanied her to the clinic on Joy Road (p 267). As the car pulled into the lot, he saw defendant Gunne whom he identified (p 273, 274). Complainant got out of the car and told the witness to give her five minutes (p 274). The doctor put his arm around complainant and they entered the clinic (p 275). The witness remained in the car 5 or 6 minutes (p 275). He got out of the car and went to the front of the clinic (p 277) and knocked on the door but there was no answer (p 280). He identified Stanley Kulczyski as a man he saw (p 283) who pulled a gun on him and called him a 'motherfucker' and fired two shots at him (p 284). The witness ran across Joy Road (p 285) and while doing so he looked back and saw Kulczyski (p 285); a second man had a long gun (p 286). The witness ran to a gas station (p 303). With people from the gas station, he returned to the clinic (p 305) and found that the cars were gone and nobody was around (p 306). The witness did not inform the police (p 306).

Police Officers Edmund Wetz (p 195) and James Collins (p 223ff) testified they were in Frankie's Bar and saw witness Knotts and the complainant enter and leave.

Edward J. Grant (p 453ff) testified to Knotts' appearance at the gas station on the night in question.

An oral surgeon (p 955ff) described the wounds to the head of complainant and resultant injuries, and a thoracic surgeon testified (p 1041) he found a bullet in the chest of complainant.

Gladys Marie Gill testified (p 963ff) that she called the police when she heard female screams coming from the trunk of the automobile. Two police officers testified (p 971ff), (p 978ff) they responded and released complainant from the trunk of the automobile.

Defendant Gunne called several character witnesses and Betty Bakewell who testified that she had worked for Dr. Gunne for 4 1/2 years (p 1139). Either she or Barbara Bowman answered the telephone in Dr. Gunne's office (p 1139, 1140). The witness said she never would have allowed an unidentified caller to speak to the doctor (p 1141). She didn't recall any telephone calls from complainant on December 20 (p 1143). She testified that a day sheet was kept on which she noted the names of all patients who came into the office (p 1144). Defendant's Exh. A were 38 day sheets covering the pertinent period of time (p 1145); no name of Linda Swanson appeared on the exhibit (p 1154). The witness, viewing the complainant in the courtroom, testified that she had never seen her in the doctor's office or elsewhere (p 1166).

Defendant Gunne testified (p 1213ff) that he had never seen defendant Kulczyski in all his life (p 1223), that he did know Hank Dombrowski (p 1228) but that he never socialized with him (p 1230) and that he knew Edward Machuta as a patient (p 1229). He testified that he had never seen complainant before the preliminary examination (p 1232). On December 20, 1972, he left his office about 9:10 or 9:15 pm (p 1244). He had not received any telephone call from anyone who identified herself as Linda Swanson (p 1244). He left his office after Betty Bakewell had left but before Barbara Bowman left (p 1267). He stopped at a party store (p 1245) and arrived home at 10:10 p.m. (p 1244). At that time his daughter, Gerri, and his son, Ted, were at home (p 1266). Dr. Gunne denied pulling a gun on complainant (p 1246) or attacking her (p 1246). He denied all the complainant's testimony (p 1262, 1263).

Defendant Gunne called Barbara Bowman (p 1482ff). She had been subpoenaed but was not available earlier when defendant Gunne presented his defense. She testified that she had never received any telephone call at the doctor's office from a Linda Swanson or any unidentified woman (p 1491). She said that she had never seen the complainant in her life (p 1496). On December 20, 1972, she saw defendant Gunne departing from the office in his car at closing time (p 1497).

Under cross-examination by the prosecutor, Barbara Bowman denied that she had made tapes of telephone conversations at defendant Gunne's office from one Linda Swanson or a strange person who sought money from defendant Gunne (p 1543, 1544); she denied that a Linda Swanson came to the doctor's office on November 22, 1972 (p 1544). She denied that she was followed into the office by a man 6 feet 2 inches in height, 250 pounds in weight who was bald and ugly (p 1545). She denied having gone to Carl's Chop House on the last Thursday in November, 1972 (p 1546). She denied she had seen the complainant there (p 1547). She denied having taped the telephone conversation which

set up the meeting at Carl's Chop House (p 1547). She denied that the following day defendant Kulczyski and Henry Dombrowski were at the doctor's office and that upon instructions from defendant Gunne she had gone to head off Dombrowski before he was seen by complainant (p 1547). She denied that on the first Friday in December, complainant was in the vicinity of defendant Gunne's office with her child (p 1550) and that later on the same day Henry Dombrowski and defendant Kulczyski were present at the office (p 1550).

The prosecutor in the jury's absence informed the court that the prosecution theorized on November 1, 1971, defendant Gunne had his wife murdered by contract killers and that complainant posed a threat to Gunne of disclosing his role in his wife's murder. He believed this was Gunne's motive in seeking to murder complainant (p 1552). The prosecutor served notice that he intended to cross-examine Barbara Bowman concerning these matters and the fact that Edward Machuta had been a go-between Gunne and the hired killers (p 1553, 1554).

Barbara Bowman was recalled to the stand in the absence of the jury and was asked by the prosecutor whether she had learned from newspapers or otherwise that the wife of Dr. Gunne had been shot and killed in her home on November 1, 1971 (p 1592). The witness declined to answer the question on the ground that the answer might tend to incriminate her (p 1592).

In the absence of the jury, Victoria Machuta testified (p 1633ff) that she was the sister of Edward (Edmund) Machuta, now deceased (p 1634), and that she made tapes of telephone conversations which she had with persons in connection with investigation into her brother's death (p 1634). She offered to make these tapes (p 1635). She was not coerced (p 1636). She used police equipment (p 1636, 1637) and as instructed, made

a tape of a telephone conversation with Barbara Bowman on December 7, 1972. Exh #1 on the Special Record was the tape of that conversation (p 1646) which she gave to Sgt. Wancha (p 1647). The tape was played to the court (p 1650).

The court ruled that the prosecutor could use the tape to impeach the testimony of Barbara Bowman but that he would be confined to impeaching only the answers which she had given while testifying (p 1739).

The prosecutor recalled Barbara Bowman after she had indicated to the court that she would claim her privilege under the 5th Amendment and asked her whether she recalled being asked certain questions concerning her relationship with Edward Machuta (p 1794). The witness refused to answer, and claimed her privilege under the 5th Amendment (p 1794). Defendants moved for a mistrial (p 1795). The prosecutor then asked the witness about her knowledge of the events surrounding the shooting of complainant (p 1799). The witness again refused to answer, claiming her privilege under the 5th Amendment (p 1799).

The defense knew about the tape recorded prior inconsistent statement of Barbara Bowman at least as early as Thursday, Decmeber 20, 1973 (Tr., 1583). They knew that Vicky Machuta was the witness authenticating the tapes from the morning of Friday, December 21, 1973, when she took the stand on a separate record to determine the admissibility of the tape (Tr., 1633). They first had an opportunity to cross-examine Vicky Machuta on the afternoon of Thursday, December 27, 1973 (Tr., 1878). Vicky was well known to the defendant because she had been his "girl" (Tr., 1650).

When the prosecutor concluded his cross-examination of Barbara Bowman, the defendant did not ask her any questions upon redirect but rested immediately

(Tr., 1800). It was not until the next morning when the prosecutor was about to begin his rebuttal that the defendant first raised a claim under the confrontation clause of the Sixth Amendment (1834). At that point the trial court offered to order the witness to testify but the defense declined (Tr., 1835).

At trial Vicky Machuta testified that some time after April 18, 1972, she talked with the Hillsdale County Prosecutor and offered to assist the investigation of her brother's death by taping conversations (Tr., 1634), that the Hillsdale Prosecutor put her in touch with Detective Inspector Mullahey of the Detroit Police to whom she offered to make tapes. He introduced her to Detective Wancha of the Dearborn Police (Tr., 1635). She later made tapes with police recording equipment as well as other recording equipment (Tr., 1637). During the fall of 1972 she had telephone conversations with Barbara Bowman (Tr., 1645) which she taped, dated, and took to Wancha (Tr., 1646). On December 7, 1972, she taped a particular conversation with Barbara Bowman (Tr., 1646), did not listen to it but gave it to Detective Wancha (Tr., 1647) at the Dearborn Police Station about the next day (Tr., 1648), and that tape was identical with the tape introduced in the proceedings (Tr., 1703).

An edited version of the tape was played to the jury (p 1876). [The transcript of the tape played to the jury appears at p 2051 of the transcript.] The conversation on the tape indicated that Barbara Bowman knew the complainant, had seen her with her child in the vicinity of Gunne's office, had seen a heavy-set bald ugly man in the office, had seen Dombrowski and defendant Kulczyski at the office that day, had attempted to head-off Dombrowski so that the complainant would not see him. She had received a telephone call from one Linda Swanson and had made an appointment for Carl's Chop House.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT OF CONFRONTATION WHEN A DEFENSE WITNESS INVOKED THE PRIVILEGE AGAINST SELF-INCRIMINATION ON CROSS-EXAMINATION.

Petitioner contends that his right to confront the witnesses against him was denied when defense witness Barbara Bowman invoked the Fifth Amendment upon cross-examination by the prosecutor to questions which might have tended to reveal her prior testimony as perjured.

Initially, after the prosecutor concluded his cross-examination of Barbara Bowman, the defendant did not ask her any questions upon redirect (Tr., 1800). Instead, the defense rested immediately after the prosecutor finished with Barbara Bowman (Tr., 1800). Indeed, it was not until the following morning, after the prosecution began its rebuttal that the defense first raised the Sixth Amendment claim (Tr., 1834). Consequently, the claim has the appearance of an appellate parachute rather then a claim of substance based upon a real loss. Moreover, at the time the claim was raised, the trial court offered to order the witness to testify. The defense declined the offer (Tr., 1835).

An even greater weakness in the defendant's claim, however, is the fact that Barbara Bowman was his own witness. This fact is determinative of the issue. A defense witness' invocation of the Fifth Amendment during cross-examination when the spectre of impeachment first arises, after she has testified favorably and without hesitation on direct-examination,

and after which the defense makes no attempt at redirect, is clearly not the evil for which the right of confrontation developed as an antidote. This Court stated in California v Green, 399 US 149, 156-157; 90 S Ct 1930; 26 L Ed 2d 489 (1970), with regard to the purpose of the confrontation clause:

> "The origin and development of the hearsay rules and of the Confrontation Clause have been traced by others and need not be recounted in detail here. It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. Prosecuting attorneys' would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," i.e, the witnesses against him, brought before him face to face. * * * ! "

The Petitioner cites Douglas v Alabama, 380 US 415; 85 S Ct 1074; 13 L Ed 2d 934 (1965) to support his claim. Douglas held a denial of the right to confrontation occurred when the prosecution presented an accomplice who was appealing his conviction from a separate trial. The prosecutor asked the accomplice to confirm or deny statements read from his confession implicating the defendant while he was invoking the Fifth Amendment. The defendant had no opportunity to cross-examine the witness in regard to the innuendo which the prosecutor had estalished by asking the

questions and which he had produced the witness specifically to achieve. In the instant case, on the other hand, the prosecutor sought to impeach a witness whom the defendant had produced and had examined at length with great benefit.

Petitioner also cites Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), which held that a limiting instruction is not sufficient to counteract a confession of a co-defendant who invoked the Fifth Amendment which the prosecutor introduced and which implicated the defendant. Bruton is hardly applicable to the instant case, where the evidence introduced was not substantive but impeachment. Moreover, in Bruton the substantive evidence, more than being merely inculpatory, was a full confession by the co-defendant. See also People v Coates, 40 Mich App 212; 198 NW2d 837 (1972), where the Michigan Court of Appeals held it not violative of the confrontation clause to admit the prior inconsistent statement of an accomplice so long as it was impeachment rather than substantive evidence.

Petitioner contends that the prosecutor's ultimately successful effort to prove the alibi witness incredible in effect rendered the witness a prosecution witness who posed a real adverse threat to his interest. Respondent contends that such an attempted conversion ought not be tolerated. The prosecutor was faced with strong testimony by Barbara Bowman exculpating the defendant. At the same time he had her prior inconsistent statement in hand. Obviously the witness had been lying at one point and on that basis fairness required that the prosecutor be allowed to deal with her testimony. Indeed it would be patently unfair if the law were to allow a witness to take the stand, to lie, and in the face of impeachment to thwart that impeachment by merely threatening to invoke the Fifth Amendment. Consequently, the defendant, as the proponent of the witness, can be reasonably expected to absorb the ramifications of her testimony.

II.

THE DEFENDANT'S RIGHT TO DUE PROCESS, U.S. CONST., AM. XIV, WAS NOT VIOLATED BY THE PROSECUTOR'S CONDUCT; THE ISSUE IS IMPROPER IN THIS FORUM.

Respondent contends that the issue presented herein was not raised in every lower court and not in the same manner presented in the petition. The issue first appears in defendant's motion for "rehearing of the rehearing" in the Michigan Court of Appeals. The issue was not presented in defendant's brief on appeal to the Michigan Court of Appeals. Instead, defendant in his brief on appeal complained of the failure to comply with the Michigan notice-of-alibi statute in failing to disclose the existence of the taped statement. Respondent rebutted that argument, and objected to the newly asserted claim of prosecutorial suppression of knowingly perjured testimony as procedurally improper when presented in the motion for rehearing of the rehearing.

In the co-defendant's case, where the issue was timely raised, the Michigan Supreme Court remanded for a hearing concerning the allegations contained in Petitioner's Issue II. The trial court found that no withholding occurred, but instead the fact that the prosecution's chief witness may have been blackmailing the defendant was fully evident in the record. Moreover, rather than rely on knowingly perjured testimony, the prosecutor himself denigrated the credibility of the complainant on that issue:

> Now, at the beginning of this trial I suggested to you that Barbara Kimmel was not likely to get high grades for Sunday School attendance or something to

that effect. I suggested to you, as I indeed do now, that she is not my client. You may think she is, but she is not my client and I don't vouch for all of the things that she says. You may well consider that as to the methods that she used in her efforts to raise money from the doctor, she was evasive when she testified here. And I wouldn't blame you because, I suppose, if one's imagination were to wander, it could be argued that she was blackmailing and she wouldn't want to make that admission here. There is nothing in the record to indicate that she was blackmailing him, but if we wanted to speculate I suppose that's a possibility that we can't very well ignore but that, ladies and gentlemen, supplies the motive for the shooting of Barbara Kimmel.

Barbara Kimmel may not be forthright when she talks about why she was doing what she was doing or how she was doing it; the important thing here, however, is was she telling the truth about what happened to her, as to where it happened, when it happened, and who did it. Now, her testimony, again is corroborated as to where and when — not entirely — you didn't have a whole streetful of witnesses to do this, but you did have Charlie, who is backed up by the guy at the gas station, Mr. Grant; you had two off-duty police officers in Frankie's Bar that is practically right next door to the doctor's office, within a half block. You got all that; you got the way that she testified about the events on the 20th of December, the black jack and the shooting

of her and, Lord knows, nobody can claim she made that part up; the woman has still got a bullet right here (indicating) and in excess of two to three hundred stitches in her head. That's real. That's brutal and it's real." (2171-2172)

Additionally, the prosecutor indicated he sent packets of Kimmel's statements raising the possibility of dishonesty on the question of blackmail, well in advance of the preliminary examinations (Evidentiary Hearing Transcript, People v Stanley Kulczyski, #72-10174, (July 9, 1975, 20). The Court of Appeals upheld the lower court's findings that no suppression occurred.

Additionally, in the instant case the defense knew about the tape's existence on Thursday, December 20, 1973 (Tr., 1583); knew that Vicky Machuta was the witness authenticating the tape from the morning of Friday, December 20, 1973, when she took the stand on the separate record to determine the admissibility of the tape (Tr., 1633); but did not have to cross-examine Vicky Machuta until the afternoon of Thursday, December 27, 1973 (Tr., 1878). Therefore, seven and one-half days actual notice of the tape and six and one-half days actual notice of Vicky Machuta preceded the time when the defense could first impeach her. Furthermore, Vicky Machuta was well known to the defendant, having been his "girl" (TR., 1650), so that preparation for possible impeachment was that much easier.

The Michigan Courts saw no reluctance to permit an evidentiary hearing when the issue posed was raised pursuant to proper procedure. The Courts found no substance to the claim presented herein.

Wherefore, Respondent herein contends that the issue raised herein does not properly present the question to this Honorable Court.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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